United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

affidavit

75-4207

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4207

MILTON EVEREST MITCHELL,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for the Respondent.

THOMAS H. BELOTE,
MARY P. MAGUIRE,
Special Assistant United States Attorneys,
Of Counsel.

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ISSUES PRESENTED

1. Whether the Board of Immigration Appeals correctly held that the petitioner's deportability under Section 241(a)(2) of the Act for entry under a false claim of citizenship was not waived by the provisions of Section 241(f) of the Act.

2. Whether the Board of Immigration Appeals correctly affirmed the decision of the Immigration Judge, denying the petitioner the discretionary privilege of voluntary departure under Section 244(e) of the Immigration and Nationality Act, 8 U.S.C. §1254(e).

STATEMENT OF THE CASE

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1105(a), Milton Everest Mitchell petitions this Court to review a final order of deportation rendered by the Board of Immigration Appeals (the "Board") on July 28, 1975 and reaffirmed by the Board on September 18, 1975. That order dismissed

an appeal from a decision of an Immigration Judge in which Mitchell was found deportable from the United States under Section 241(a)(2) of the Act, 8 U.S.C. §1251(a)(2), and was denied the discretionary privilege of voluntary departure pursuant to Section 244(e) of the Act, 8 U.S.C. §1254(e). Mitchell contends that the Board erred in denying him voluntary departure in lieu of deportation, in the alternative, erred in finding him ineligible from relief under Section 241(f) of the Act, 8 U.S.C. §1251(f).

STATEMENT OF FACTS

The petitioner, Milton Everest Mitchell is a 37 year old native and citizen of Trinidad who last entered the United States on August 5, 1974 at Niagara Falls, New York at which time he falsely claimed to be a citizen of the United States.* Mitchell successfully gained his admission to his country by presenting a birth

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*Mitchell first entered the United States in 1960 as a non-immigrant visitor for pleasure, and failed to depart from the United States at the expiration of his authorized visitation (T.20, p.6). From 1960 until his sojourn to Canada in August 1974 he resided and worked in the United States in violation of the law.

certificate relating to a deceased United States citizen, Cariel Wesley Oliver, to the immigration officials at the Rainbow Bridge inspection station (T.9, T.14, T.20, p.2).* After his entry and admission as a United States citizen Mitchell proceeded to the Niagara Falls bus depot where, for the following six hours, he awaited the entry of two female companions who were transporting his automobile across the border from Canada. Mitchell's friends first arrived at the inspection station by taxi and were found to be in possession of a New York driver's license relating to Mitchell. They later returned to Canada and subsequently re-entered the United States in an automobile registered in the name of the petitioner. Mitchell's subsequent questioning by immigration officials at the bus depot led to the alien's admission that he had falsely represented himself to be a United States citizen at the time of his entry and admission to this country. (T.9).

The Immigration and Naturalization Service (the "Service") commenced deportation proceedings against

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*References proceded by "T" are to the certified administrative record which has been filed with this Court.

Mitchell with the issuance of an order to show cause and notice of hearing charging that he was deportable under Section 241(a)(2), 8 U.S.C. §1251(a)(2), i.e., entering the United States without inspection (T.21). Mitchell requested an immediate hearing (T.21), and on August 6, 1974 the petitioner appeared at a deportation hearing before Immigration Judge, Ira Fieldsteel. Mitchell was accompanied at that hearing by his wife and his halfbrother. At the commencement of the hearing the Immigration Judge explained the purpose of the hearing and specifically advised Mitchell of his statutory right to counsel at the proceeding (T.20, p.1). In response to the Immigration Judge's inquiries the petitioner waived his right to counsel and requested to proceed with the hearing (T.20, p.1). Upon the inquiries of the Immigration Judge, Mitchell conceded the factual allegations contained in the order to show cause and applied for the discretionary privilege of voluntary departure (T.20, p.2). At the conclusion of the deportation hearing the Immigration Judge found Mitchell deportable as charged and declined to grant him the discretionary privilege of voluntary departure as a matter of adminis-

trative discretion (T.19). In his decision the Immigration Judge noted that although Mitchell was married to a citizen of the United States and had one child born in this country, the alien had planned his fraudulent entry into the United States; had failed to pay his income tax despite his purchase of expensive personal property; had probably engaged in activity which would statutorily preclude a finding of good moral character under Section 101(f), 8 U.S.C. §101(f), thereby rendering Mitchell ineligible for voluntary departure; and finally, had failed to take any action with respect to obtaining an immigrant visa and thereby normalizing his immigration status.

On August 13, 1974 the petitioner, by his present counsel, appealed the decision of the Immigration Judge to the Board of Immigration Appeals requesting the privilege of voluntary departure (T.18). During the pendency of this appeal Mitchell moved to reopen his deportation proceeding in order to apply for relief under Section 241(f) of the Act. On March 19, 1975 the Board heard oral argument on both the appeal and the motion to

reopen the proceedings (T.10, pp.1-4). On July 28, 1975 upon consideration of the petitioner's argument and his briefs (T.8, T.14), the Board affirmed the decision of the Immigration Judge, dismissed the appeal, and declined to reopen the proceedings (T.7). The Board noted that Mitchell had been properly found deportable under Section 241(a)(2) of the Act and was therefore ineligible for relief under Section 241(f). Furthermore, the Board found that in view of the adverse factors set forth in the decision of the Immigration Judge, Mitchell's application for voluntary departure was properly denied. On August 15, 1975 the alien moved the Board to reconsider its decision of July 28, 1975 (T.3). This motion was denied by the Board on September 18, 1975. On September 25, 1975 the alien filed this petition for review of the Board's decisions. Since the filing of this petition the alien has enjoyed the automatic statutory stay of deportation which accompanies the filing of an action under Section 106 of the Act, 8 U.S.C. §1105(a).

RELEVANT STATUTES

Section 241(a)(2) of the Act, 8 U.S.C. §1251(a)(2)

> Any alien in the United States (including an alien crewman) shall upon the order of the Attorney General, be deported who -
>
> (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States; ...

Section 241(f) of the Act, 8 U.S.C. §1251(f)

> The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

Section 244(e) of the Act, 8 U.S.C. §1254(e)

> The Attorney General may, in his discretion, permit any alien under deportation

proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a)(and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under his subsection.

AGRUMENT

MITCHELL WAS CORRECTLY FOUND DEPORTABLE UNDER SECTION 241(a)(2) OF THE ACT, 8 U.S.C. §1251 (a)(2) BY REASON OF HIS ENTRY AND ADMISSION UNDER A FALSE CLAIM OF CITIZENSHIP, AND WAS PROPERLY DENIED RELIEF UNDER SECTIONS 241(f) AND 244(e) OF THE ACT.

POINT I

THE WAIVER PROVISION OF SECTION 241(f) IS UNAVAILABLE TO ALIENS, LIKE THE PETITIONER, WHO WERE CHARGED AND FOUND DEPORTABLE UNDER SECTION 241(a)(2) OF THE ACT.

Mitchell contends that although he did not submit himself, as an alien, for inspection by

immigration officials at the border, and despite the fact that he entered and was admitted to the United States under a false claim of citizenship, he is nonetheless eligible for relief from deportation by virtue of the provisions of Section 241(f) of the Act, 8 U.S.C. §1251(f). Section 241(f) automatically waives the grounds of deportability of an alien if deportation is based upon the ground that the alien was excludable at the time of his entry into the United States because of fraud or misrepresentation and if the alien has an American citizen spouse, parent or child. It is respectfully submitted that Mitchell's contention should be rejected in light of the explicit and carefully limited statutory language of the waiver provision, and the holding of the Supreme Court in Reid v. Immigration and Naturalization Service, 420 U.S. 619 (1975) and the decisions of various Courts of Appeals including this one. See Pereira-Barreira v. United States Department of Justice, 523 F.2d 503 (2d Cir. 1975); Bufalino v. Immigration and Naturalization Service, 473 F.2d 728 (3rd Cir. 1973), cert. denied, U.S. (1973).

The petitioner has been ordered deported under Section 241(a)(2) of the Act in that he entered the United States under a false claim of citizenship, and was therefore deportable for entry without inspection. In Reid v. Immigration and Naturalization Service, supra, the Supreme Court affirmed a decision by this Court (reported at 492 F.2d 265) denying relief under Section 241(f) to an alien couple who, like the petitioner in this action, entered the United States under a false claim of citizenship. As in this case, the Service sought to deport the Reids on the ground that they had entered the United States without being inspected, and were thus deportable under Section 241(a)(2) of the Act. Furthermore, as in the petitioner's case, the deportation charge was based on the fact that at the time of the Reid's entry they had not been properly inspected by immigration authorities.*

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*Inspection and examination of aliens entering the United States is provided for by the direct statutory mandate of Section 235 of the Act, 8 U.S.C. §1225. Further, 8 U.S.C. §§1221-1226 are part of the immigration process which may result in the exclusion of certain aliens.

In ruling that the Reids could not avail themselves of the automatic waiver of deportation the Supreme Court found that the "language of §241(f) tracks the provisions of §212(a)(19), 8 U.S.C. §1182(a)(19)" and for the waiver to apply deportation must be based on Section 241(a)(1) which incorporates Section 212(a)(19) as grounds of deportation. Reid v. Immigration and Naturalization Service, supra, 622. The Court also found that the grounds for deportation set out in Section 241(a)(2) were "wholly independent of any basis for deportation which may exist under §241(a)(1)" Id., 622, n.2.

Specifically, the Court continued,

> "Thus, the 'explicit language' of §241(f), upon which petitioners rely, waives deportation for aliens who are 'excludable at the time of entry' by reason of the fraud specified in §212(a)(19), and for that reason deportable under the provisions of §241(a)(1). If the INS were seeking to deport petitioners on this ground, they would be entitled to have applied to them the provisions of §241(f) because of the birth of their children after entry.
>
> But the INS in this case does not rely on §212(a)(19), nor indeed on any of the other grounds for excludability under §212, which

> are in turn made grounds for deportation by the language of §241(a)(1). It is instead relying on the separate provision of §241(a)(2), which does not depend in any way upon the fact that an alien was excludable at the time of his entry on one of the grounds specified in §212(a). Section 241(a)(2) establishes as a separate ground for deportation, quite independently of whether the alien was excludable at the time of his arrival, the failure of an alien to present himself for inspection at the time he made his entry. If this ground is established by the admitted facts, nothing in the waiver provision of §241(f), which by its terms grants relief against deportation of aliens 'on the ground that they were excludable at the time of entry,' has any bearing on the case. Cf. Costanzo v. Tillinghast, 287 U.S. 341, 343 (1932)." Id., at 623.

Concluding that an alien who accomplishes an entry into the United States by making a willfully false representation that he is a United States citizen may be charged with entry without inspection, the Court in Reid stated:

> We agree with these holdings, and conclude that an alien making an entry into this country who falsely represents himself to be a citizen would not only be excludable under §212(a)(19) if he were detected at the time of his entry, but has also so significantly frustrated the process for

inspecting incoming aliens that he is also deportable as one who has "entered the United States without inspection." In reaching this conclusion we subscribed to the reasoning of Chief Judge Aldrich, writing for the Court of Appeals for the First Circuit in Goon Mee Heung v. INS, 380 F.2d 236, 237, cert. denied, 389 U.S. 975 (1967):

"Whatever the effect other misrepresentations may arguably have on an alien's being legally considered to have been inspected upon entering the country, we do not now consider; we are here concerned solely with an entry under a fraudulent claim of citizenship. Aliens who enter as citizens, rather than as aliens, are treated substantially differently by immigration authorities. the examination to which citizens are subjected is likely to be considerably more perfunctory than that accorded aliens. Gordon & Rosenfield, Immigration Law and Procedure §316d (1966). Also aliens are required to fill out alien registration forms, copies of which are retained by the immigration authorities. 8 C.F.R. §§235.4, 264.1; 8 U.S.C. §§1201(b), 1301-1306. Fingerprinting is required for most aliens. 8 U.S.C §§1201(b), 1301-1302. The net effect, therefore, of a person's entering the country as an admitted alien is that the immigration authorities, in addition to making a closer examination of his right to enter in the first place, require and obtain information and a variety of records that enable them to keep track of the alien after his entry. Since none of these requirements is applicable to citizens, an alien who enters by claiming to be a citizen has effectively put himself

> in a quite different position from other admitted aliens, one more comparable to that of a person who slips over the border and who has, therefore, clearly not been inspected." Reid v. Immigration and Naturalization Service, supra at 625.

Finding that the grounds of his original appeal to the Board vanished when the Supreme Court rendered its decision in Reid (T.15), Mitchell now claims that the circumstances surrounding his entry were distinguishable from those in the Reid case. Specifically, the petitioner states that the inquiries by immigration officials at the border inspection station were not of the perfunctory nature described in Reid. It is submitted that Mitchell's contention is without merit. Mitchell presented himself at the inspection station as a citizen and was questioned by the authorities in that capacity. He was never inspected by the immigration authorities pursuant to the mandate of Section 235 of the Act, 8 U.S.C. §1225, and by claiming to be a citizen, quite clearly put himself in a different position from other admitted aliens. Reid, supra at 625. Nor does Mitchell's subsequent questioning and apprehension by immigration officials require a divergence from

the rule enunciated in Reid. Mitchell had already been admitted to the United States as a citizen. He had already frustrated the process of inspection required of all aliens by 8 U.S.C. §1225, and even to this date the authorities have not had the opportunity to ascertain whether or not Mitchell is excludable. 8 U.S.C. §1225; 8 C.F.R. Part 235. Merely because Mitchell was ultimately unsuccessful in his attempt to resume his illegal residence in this country, his position viz-a-viz eligibility for relief under Section 241(f) remains indistinguishable from that of the Reids.

POINT II

THE IMMIGRATION JUDGE PROPERLY EXERCISED HIS DISCRETIONARY AUTHORITY AND DENIED MITCHELL THE PRIVILEGE OF VOLUNTARY DEPARTURE PURSUANT TO SECTION 244(e) OF THE ACT, 8 U.S.C. §1254(e)

The grant of voluntary departure in lieu of deportation is a form of discretionary relief available to a deportable alien under Section 244(e) of the Act. See also 8 C.F.R. §244.1. The Courts have consistently adhered to the view that the authority to grant or deny

this relief is within the sound discretion of the Attorney General. See Gambino v. Immigration and Naturalization Service, 419 F.2d 1355, 1358 (2d Cir. 1970); Strantizalis v. Immigration and Naturalization Service, 465 F.2d 1016 (3rd Cir. 1972); Shukukani v. Immigration and Naturalization Service, 435 F.2d 1378 (8th Cir. 1971), cert. denied 403 U.S. 920.

In order to qualify for the privilege of voluntary departure the alien must first satisfy certain objective statutory prerequisites contained in the statute. Furthermore, the applicant for voluntary departure bears the burden of showing that he meets the prescribed conditions. 8 C.F.R. §242.17(d). See also Aalund v. Marshall, 461 F.2d 710 (5th Cir. 1972) (burden is upon the alien to demonstrate she had not committed adultery).

Attainment of the statutory minimum, however, does not mean that relief should be automatically granted. Fernandez-Gonzalez v. Immigration and Naturalization Service, 347 F.2d 737 (7th Cir. 1965).

The alien still has the burden of convincing the Attorney General that he merits the favorable exercise of discretionary relief. Strantizalis v. Immigration and Naturalization Service, supra (alien found to have engaged in deliberate and deceptive efforts to avoid compliance with the immigration laws); Hamed v. Immigration and Naturalization Service, 420 F.2d 645, 647 (D.C. Cir. 1969) (denial of voluntary departure in light of alien's use of fraudulent documentation including a birth certificate found proper exercise of discretionary authority); Gambino v. Immigration and Naturalization Service, supra at 1358 (current source of income is a relevant inquiry in determining whether the grant of discretionary relief is justified); see also Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1957). Nor does the potential separation of family members necessarily require the grant of this discretionary relief.* Aalund v. Marshall, supra at 714;

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*It is well-settled that neither the marriage of an illegal and deportable alien to an American citizen nor the birth of a citizen child confer upon an alien a right to enter or remain in the United States. Swartz v. Rogers, 254 F.2d (D.C. Cir. 1958), cert. denied, 357 U.S. 928; Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970), cert. denied 402 U.S. 983; Faustino v. Immigration and Naturalization Service, 432 F.2d 429 (2d Cir. 1970), cert. denied 401 U.S. 921.

Vassiliou v. District Director, 461 F.2d 1193 (10th Cir. 1972); See also Hintopoulos v. Shaughnessy, supra.

The sole issue presented upon the denial of Mitchell's application for voluntary departure is whether or not the Board or the Immigration Judge abused their discretion in denying that relief. The scope of judicial review of this discretionary decision is extremely narrow. Unless that decision is found to be without any rational basis or to depart inexplicably from established practices as to rest on an impermissible basis, the Courts have stated that they should not substitute their judgment for that of the Attorney General and his delegates. See Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715 (2d Cir. 1966).

It is respectfully submitted that the decision of the Immigration Judge is amply supported upon a rational basis and is consistent with established policies and practices adopted under the immigration laws. The record reflects that Mitchell's use of a fraudulent birth certificate was neither innocent nor inadvertent. In addition

although Mitchell alleged that he had previously conferred with an attorney concerning the filing of his income tax return, to this date there is no evidence in the record that the petitioner has ever complied with the Internal Revenue Service laws. Further, Mitchell's testimony at the hearing (T.20, pp. 12-13) indicated it was highly probable that his activities in Canada might statutorily bar the requisite finding of good moral character under Section 101(f) of the Act, 8 U.S.C. §1101(f). Finally, the Immigration Judge noted that despite his continued and illegal residence in the United States Mitchell had consistently failed to make an attempt to regularize this immigration status. The record demonstrates that Mitchell's immigration history is clearly an example of a non-immigrant alien enjoying the rights, privileges, and comforts of an American citizen, or lawful permanent resident alien, while purposefully refusing to accept the responsibilities that accompany those positions.

It is respectfully submitted that the potential remedy for the situation in which the petitioner

has placed himself, is not that he seek to overturn a proper order of the Board, but rather that he diligently pursue an immigrant visa and the necessary permission to enter the United States under Section 212(a)(17), 8 U.S.C. §1182(a)(17).

CONCLUSION

The petition for review should be dismissed.

March 9, 1976.

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for Respondent.

THOMAS H. BELOTE,
MARY P. MAGUIRE,
Special Assistant United States Attorneys,
Of Counsel.

Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

CA 75-4207

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn,
deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 9th day of March, 19 76 she served a copy of the within brief for respondent

by placing the same in a properly postpaid franked envelope addressed:

Leo Ypsilanti, Esq.,
225 Broadway
New York, NY 10007

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this
9th day of March, 19 76

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977